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No. .....

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In The

Supreme Court of the United States

October Term, 1984

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LINDA McMAHON, California Director
Of Social Services,

Petitioner,

v.

ELIZABETH GREEN, et al.,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

—o—

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QUESTIONS PRESENTED

Whether attorneys' fees are awardable under the Civil Rights Attorneys' Fees Award Act of 1976 (codified at 42 U.S.C. § 1988) where a comprehensive federal-state program provides a state remedy and a limited award of attorneys' fees.

Whether the Civil Rights Attorneys' Fees Award Act of 1976 (codified at 42 U.S.C. § 1988) authorizes an award of fees in an action which was not plead or pursued under the Civil Rights Act, but potentially could have been.

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No. .....

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LINDA McMAHON, California Director
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v.

ELIZABETH GREEN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

Linda McMahon respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Third Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District, is reported at 161 Cal.App.3d 678 and appears as Appendix A, pp. 1a-11a. That court's modification of the opinion is reported at 162 Cal.App.3d 2026

and appears as Appendix B, p. 1b. The California Supreme Court's denial of hearing was reflected in the court's February 14, 1985 minutes as reported in the California Official Reports, 1985 Number 8, page 35. The current action grows out of an earlier California Supreme Court decision which does not touch on the current dispute (*Green v. Obledo* (1981), 29 Cal.3d 126).

JURISDICTION

The judgment of the California Court of Appeal was rendered November 6, 1984. On December 5, 1984, the court modified the opinion while denying a petition for rehearing. The Supreme Court of California denied a hearing on February 14, 1985 (Bird, C.J., did not participate; Mosk, J., was of the opinion that the petition should be granted). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

STATUTORY PROVISIONS INVOLVED

Title 42 United States Code section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit

in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Title 42 United States Code section 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect: but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Title 45 Code of Federal Regulations, section 205.10 provides in relevant part:

"§ 205.10 Hearings.

"(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI of the Social Se-

curity Act shall provide for a system of hearings under which:

"(1) The single State agency responsible for the program shall be responsible for fulfillment of hearing provisions which shall provide for:

"(i) A hearing before the State agency, or

"(ii) An evidentiary hearing at the local level with a right of appeal to a State agency hearing. Where a State agency adopts a system of evidentiary hearings with an appeal to a State agency hearing, it may, in some political subdivisions, permit local evidentiary hearings, and in others, provide for a single hearing before the State agency. Under this requirement hearing shall meet the due process standards set forth in the U.S. Supreme Court decision in Goldberg v. Kelly, 397 U.S. 254 (1970) and the standards set forth in this section."

California Welfare and Institutions Code, Division 9, Part 2 (Administration of Public Social Services) section 10950 provides:

"§ 10950. Opportunity; recipient defined

"If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of public social services, if his application is not acted upon with reasonable promptness, or if any person who desires to apply for public social services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors, upon filing a request with the State Department of Social Services or the State Department of Health Services, whichever department administers the public social service, be accorded an opportunity for a fair hearing.

"For the purposes of administering health care services and medical assistance, the State Director of Health Services shall have those powers and duties conferred on the Director of Social Services by this chapter to conduct fair hearings in order to secure approval of a state plan under the provisions of applicable federal law.

"The State Director of Health Services may contract with the State Department of Social Services for the provisions of fair hearings in accordance with this chapter.

"As used in this chapter, 'recipient' means an applicant for or recipient of public social services except aid exclusively financed by county funds or aid under Chapter 3 (commencing with Section 12000) of Part 3 of this division."

California Welfare and Institutions Code, section 10962 provides:

"§ 10962. Judicial Review

"The applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings. Immediately upon being served the director shall serve a copy of the petition on the other party entitled to judicial review and such party shall have the right to intervene in the proceedings.

"No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a pref-

erence in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.

STATEMENT OF THE CASE

This case, which was filed in 1975, originally dealt with California's Aid to Families With Dependent Children Program, a federal grant-in-aid program under title IV-A of the Social Security Act. Net earnings of employed welfare recipients are deducted to some degree from their welfare grants. Plaintiffs (Green, et al.) were welfare recipients who disputed California's use of a fixed mileage rate when calculating automobile transportation expenses as a deduction from earnings. The plaintiff welfare recipients attacked the welfare rule through the "fair hearing" process mandated by the Social Security Act (as codified at 42 U.S.C., § 602(a)(4), clarified at 45 C.F.R., § 205.10 and implemented in California through Wel. & Inst. Code, § 10950). The plaintiffs prevailed and were awarded retroactive benefits (although not allowed in federal courts [*Quern v. Jordan* (1979) 440 U.S. 332] retroactive benefits are awardable in California courts). Having prevailed, plaintiffs' counsel moved for an award of attorneys' fees under Welfare and Institutions Code section 10962 (fees for prevailing parties in fair hearings) and under California's codification of the private attorney general theory (Calif. Code of Civ. Proc., § 1021.5).

The state court on May 27, 1982, awarded fees in excess of the statutory limits found in the State Budget Act and the State was unable to pay.[1] Under the California Constitution, the Legislature has plenary power to appropriate funds. Given the California courts' lack of jurisdiction to order an appropriation, a levy, or an execution to satisfy their attorneys' fee award against the state, plaintiffs' counsel (now representing themselves) needed to invoke federal powers.

On December 23, 1982, plaintiffs' counsel (led by San Francisco Neighborhood Legal Assistance Foundation and hereafter referred to as SFNLAF) filed a "Notice of Motion for Order Joining Parties Defendant and Compelling Payment of Attorneys' Fees Pursuant to 42 U.S.C. Section 1988." The motion asked the trial court to add new parties (six years after trial), find that the action had really been a federal civil rights case, and reaward attorneys' fees under section 1988. SFNLAF's theory was that if the case metamorphosed into a federal civil rights action the state court could assume federal court powers. Quoting from *Spain v. Mountanos* (9th Cir. 1982) 690 F.2d 742 at 746, they argued that "[u]nder the Supremacy Clause of the United States Constitution, a court, in enforcing federal law, may order state officials to take actions despite contravening state laws."

The trial court denied SFNLAF's motion and they appealed to the California Court of Appeal, Third Appel-

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1. Fees awarded under section 10962 are limited to a total of less than $20,000; private attorney general fee awards are limited to the California attorney general's hourly billing rate (currently $63.75 per hour) with a total per case limit of $50,000.

late District. In their opening brief, SFNLAF alleged inter alia that:

> The Supremacy Clause of the United States Constitution (Article VI, clause 2) states:
>
> > This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> Applying the Supremacy Clause to this case, the "Laws of the United States" are 42 U.S.C. 1983 and 1988, the "Judges in every State" include the trial court; and the "thing[s] in the Constitution or laws of any State" are the budget act restrictions and related statutes and constitutional provisions. The meaning is clear: the trial court is required to enforce 42 U.S.C. 1983 and 1988 notwithstanding the state budget restrictions.
>
> * * *
>
> Moreover, the Supremacy Clause imposes upon the trial court an affirmative obligation to exercise its authority to enforce federal law fully and effectively.
>
> In this case, the plaintiffs have by motion sought to obtain payment of a fee award made to them in an action in which they vindicated rights secured by 42 U.S.C. 1983. No contravening state laws may impair plaintiffs' entitlement to payment of that fee

> award pursuant to 42 U.S.C. 1988. The trial court was required to enforce federal law by granting plaintiffs' motion for payment of attorneys' fees. (Footnotes omitted.)

The ruling of the Court of Appeal is appended to this petition. In summary, the Court held that:

(a) To avoid state law restrictions on attorneys' fees SFNLAF sought *enforcement* of their award under 42 U.S.C. section 1988.

(b) SFNLAF was entitled to fees under 42 U.S.C. section 1988 if it *alleged* facts which could constitute a cause of action under 42 U.S.C. section 1983.

(c) Although fees were awarded under a law which restricts the amount of payment, the payment was not restricted because the court *could have,* and therefore *did,* order payment under 42 U.S.C. section 1988.

The Court of Appeal certified its decision for publication, and the California Supreme Court denied hearing. As interpreted by California's courts, federal law now allows the addition of a civil rights cause of action years after judgment, through a motion to enforce a state law judgment. No proof is required on the new cause of action. Judgments may be enforced for ten years in California (Calif. Code of Civ. Proc., § 683.020) and are subject to unlimited renewal (Calif. Code of Civ. Proc., § 683.130). As a result, many heretofore uncollectibly large judgments are now eligible for conversion to, and enforcement as, judgments in civil rights actions.

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REASONS FOR GRANTING THE PETITION

With this Court's decision in *Alyeska Pipeline Service Company v. Wilderness Society* (1974) 421 U.S. 240, there was a great movement to codify the private attorney general theory and provide attorneys' fees to those who pursue public interest litigation. Congress adopted the Civil Rights Attorneys' Fees Award Act of 1976 (42 U.S.C. § 1988) and California's Legislature adopted California Code of Civil Procedure section 1021.5 the next year (Stats. 1977, Chap. 1197). With time, however, the California Legislature decided that controls were necessary on fees being awarded under the private attorney general theory. These controls caused a flood-tide of litigation which has yet to ebb. The attorneys' fee segments of cases are now more complex and consuming than the cases in chief, and it is imperative that the legislative prerogative over fees be defined.

Whether 42 U.S.C. section 1988 can be dilated to the extent it has been in this case is of profound importance to all states. The question should be settled by this Court lest the decision below continue to be the definitive case on the subject.

As set forth below, the California Court of Appeal has departed from the accepted and usual course of judicial proceedings by allowing a federal cause of action to be raised years after judgment, totally disregarding the theory on which the case was tried. The decision itself interprets federal law in a way in conflict with other state courts of last resort, and in conflict with the decisions of this Court.

A. The Decision Conflicts With The Decisions Of This Court On Entitlement To Attorneys' Fees Under Section 1988 Where An Express Statutory Remedy Obviates The Need To Invoke Section 1983.

In *Middlesex County Sewerage Authority v. National Sea Clammers Association* (1981), 453 U.S. 1, 20, this Court ruled that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."

In *Smith v. Robinson,* No. 82-2120 (1984) — U.S. —, 104 S.Ct. 3457, the Court noted that:

> "the action and relief granted in this case fell within the reach of the EHA, a federal statute that establishes a comprehensive federal-state scheme . . . but that does not provide for attorney's fees." (Slip. Op. at 8.)

Recognizing a "general proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of § 1983," the Court denied fees, and noted that "[i]f a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case." (Slip. Op. at 10.) For elaborations on the theme by lower courts see *Noe v. Ambach* (S. D. N.Y. 1982) 542 F.Supp. 70, 72-73, and *Department of Education of the State of Hawaii v. Katherine D.* (9th Cir. 1983) 727 F.2d 809.

Even in *Hutto v. Finney* (1978) 437 U.S. 698 (the seminal case on § 1988 attorneys' fees awards against

states) the Court noted the appropriateness of awarding fees under § 1988 because of the lack of "an intricate regulatory scheme offering alternative methods of obtaining relief." (*Id.* at 698, fn. 31.)

In the case at bar, a comprehensive federal-state statutory remedy was available. Title 42, United States Code, section 602(a)(4) mandates state programs under Title IV-A of the Social Security Act to have appeals procedures. The procedures are clarified in 45 C.F.R. section 205.10 which is set forth at the beginning of this petition. The federally mandated remedial provisions are implemented in California through Welfare and Institutions Code, Division 9, part 2, chapter 7 commencing with section 10950. Two of the more pertinent sections, section 10950 and 10962, are set out verbatim at the beginning of this petition.

Not only was a specific and comprehensive remedial scheme available here, it was followed and followed successfully. Neither section 1988 nor any of the sections giving rise to an award under section 1988 was mentioned in this case until six years after trial and almost a year after remittitur from the California Supreme Court. It is difficult to conceive of a more classic example of section 1988 serving "no purpose other than that of a conduit for attorneys' fees." (*Tatro v. State of Texas* (N.D. Texas 1981) 516 F.Supp. 968, 984.)

B. The Propriety Of Allowing 42 U.S.C. Section 1983 To Be Raised After Trial Involves Important Questions Of Federal Law And Should Be Settled By This Court.

Title 42 United States Code section 1983 provides that:

> "Every *person* who, under color of [law] . . . subjects [any person] . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." (Emphasis added.)

California is not a person.

This Court has ruled that section 1983 actions may not be filed against *states* themselves, they may only be filed against individuals, and then not under a respondeat superior theory. (*Moor v. County of Alameda* (1973) 411 U.S. 693, 699-700; *Monroe v. Pape* (1961) 365 U.S. 167, 187-191, overruled on other grounds in *Monell v. Dept. of Social Services of the City of New York* (1978) 436 U.S. 658, 691, 701; see also *Bennett v. People of the State of California* (9th Cir. 1969) 406 F.2d 36, *Seller v. Regents of the University of California* (9th Cir. 1970) 432 F.2d 493, *Fialkowski v. Shapp* (E.D. Pa. 1975) 405 F.Supp 946, 950 (personal involvement of the defendant is a necessary element of the cause of action); and *Knipp v. Weikle* (N.D. Ohio 1975) 407 F.Supp. 782, 783 supervisory personnel may not be held liable purely on a respondeat superior theory).

If and when a section 1983 action is filed against an individual there are several immunities available under the federal civil rights law which the defendant theoretically could claim. The most general is the good faith im-

munity which protects government officials who are simply performing their official duties in good faith (*Scheuer v. Rhodes* (1974) 416 U.S. 232; *Wood v. Strickland* (1975) 420 U.S. 308, 315-317, 319; see also *Bennett v. People of the State of California* (9th Cir. 1969) 406 F.2d 36).

In the *Wood* case the court held that the "legislative" immunity extends to school board members. That immunity is relevant in this case since the original lawsuit heard by the California Supreme Court dealt with the state defendants' quasi-legislative act of adopting regulations. The state defendants' other alleged wrong, adoption of an adverse fair hearing decision, has been declared by the California courts (*Taylor v. Mitzel* (1978) 82 Cal. App.3d 665) to be subject to "judicial" immunity from suit under section 1983. "Good Faith" immunity protects government officials from personal liability, and since damages against them in their official capacity would be against the state itself, those damages have been held to be barred under section 1983 (*Familias Unidas v. Briscoe* (5th Cir. 1980) 619 F.2d 391, 403).

The original two defendants in this case were Marion Woods, California Director of Social Services (then known as the Department of Benefit Payments) and Mario Obledo, Secretary of Health and Welfare. Secretary Obledo was sued on a strictly respondeat superior theory. Director Woods was alleged to have adopted regulations (the face of the complaint showed they were filed years before he took office), and of having adopted a fair hearing decision (a delegated function). The action having been a routine welfare benefit appeal with no prayer for

relief from the personally named defendants, neither participated in the litigation.

If section 1983 causes of action can be alleged after trial, several problems arise.

— the defendant's right to a trial on the merits, either by court or jury, is lost. Even if expenses or judgments are eventually borne by the state, ex-public officials may suffer from the disrepute of a 'judgment' holding that they denied people their rights while in office.

— the defendant's right to assert immunities is lost.

— the rights of plaintiffs too are potentially lost. If the prevailing plaintiff can allege section 1988 after trial and collect attorneys' fees, then so theoretically can a prevailing defendant under the plain language of section 1988.

The California Court of Appeal in this case ignores the rights of the individuals involved because they treat the action as against the *state* and order the current Director of Social Services to pay. That is a major deviation from the existing case law on section 1988. This Court should settle the questions raised by California Court of Appeal before those questions are magnified.

C. The Decision Conflicts In Principle With The South Carolina Supreme Court's Decision In Spencer v. South Carolina.

On March 27, 1985, this honorable Court affirmed (per curiam, by an equally divided court) Case No. 84-249, the South Carolina Supreme Court's decision in *Spencer v. South Carolina* (S.Car. 1984) 316 S.E.2d 386. In the

Spencer case, the South Carolina Supreme Court struck down a state statute as violative of the Privileges and Immunities Clause of the United States Constitution (art. IV. § 2, clause 1). While ruling on a federal issue, the South Carolina court refused to award attorneys' fees under section 1988, finding that:

> "[i]t may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988. *Brown v. Hornbeck,* 54 Md.App. 404, 458 A.2d 900 (1983)." (*Id.* at 389.)

In the case at bar, the plaintiffs *never* alleged sections 1983 or 1988 until their December 1982 motion to compel *payment* of attorneys' fees that had been awarded under state law. As in the *Spencer* case, the sole reason for alleging section 1983 was to justify collection of fees. Although the factual context is similar, the California court's interpretation of congressional intent is markedly at odds with the interpretation of the South Carolina Supreme Court.

———o———

CONCLUSION

For all of the above-stated reasons, this Court should issue a writ of certiorari to review the decision of the California Court of Appeal, Third Appellate District.

Respectfully submitted,

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To Practice under submission

May 1985

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND FOR THE
THIRD APPELLATE DISTRICT
(Sacramento)

3 Civ. 22869
(Super Ct. No. 257585)

ELIZABETH GREEN, et al.,

Plaintiffs and Appellants,

v.

MARIO OBLEDO, et al.,

Defendants and Respondents.

(Filed November 6, 1984)
Court of Appeal - Third District
Wilfried J. Kramer, Clerk

APPEAL from a judgment of the Superior Court of Sacramento County. Fred W. Marler, Judge. Reversed.

Thomas W. Pulliam, Jr., David J. Rapport for Appellants. John K. Van De Kamp, Attorney General, Thomas E. Warriner, Assistant Attorney General, Richard M. Ross, Deputy Attorney General, for Defendants and Respondents.

The plaintiffs were denied enforcement of a final judgment for attorneys' fees, entered following their suc-

cess in an action which invalidated a state welfare regulation. (See Green v. Obledo (1981) 29 Cal.3d 126.) The trial court held that payment is precluded by restrictions in the State Budget Act. There is no such impediment. We will reverse the trial court's order.

Procedural and Factual Background

Plaintiffs, Elizabeth Green and others, were denied Aid to Families with Dependent Children (AFDC) benefits because a state welfare regulation disallowed work-related expenses. The California Supreme Court upheld a judgment declarating that the regulation was invalid as a violation of federal law. (Green, supra, 29 Cal.3d at pp. 134-140.) The plaintiffs filed a cost bill for appellate attorney fees of $34,439. (See Code Civ. Procedure, § 1034.) It was not opposed and the award became final in 1981. Plaintiffs then sought attorneys' fees for their services in the trial court on the grounds that "at least two statutes authorize such an award", namely, Welfare and Institutions Code section 10962 and Code of Civil Procedure section 1021.5. In 1982 they were awarded fees for services in the trial court in the amount of $53,246.25. No appeal was taken from this order.

Plaintiffs were not paid their attorney fees. They sought an order in the trial court, predicated upon 42 United States Code section 1988, compelling the defendant Director of the Department of Social Services to submit a claim to the controller and compelling the controller and treasurer to authorize and pay the claim. The motion was denied. This appeal followed.

Discussion

The award of attorneys' fees was predicated (in part) upon provisions of state law which arguably are subject to monetary restrictions in the State Budget Acts. To avoid these potential impediments to payment, the plaintiffs sought enforcement of the award predicated upon the federal Civil Rights Act (42 U.S.C. § 1988)[1] which, they say, suffers no such impediment. Section 1988 applies only when the action arises under the substantive provisions of the act, here 42 United States Code section 1983.[2] The defendants rejoin that by this move the plaintiffs seek to add a new (federal) cause of action after judgment. Failing this argument, defendants challenge the jurisdiction of the court to predicate attorneys' fees upon a federal claim which entails payment of moneys restricted by the budget acts. We review these challenges seriatim.

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[1] Section 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[2] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A

Whether the plaintiffs tendered a 1983 claim in the underlying action is measured by their pleadings. They alleged Woods adopted and enforced a regulation which violated a federal statute governing the AFDC program, resulting in the improper denial of federal benefits to plaintiffs. This pleads a 1983 claim. Under our code pleading system (See 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading § 1) the complaint need only contain a "statement of the facts constituting the cause of action, in ordinary and concise language." (Code Civ. Proc., § 425.10, subd. (a); 3 Witkin. Cal. Procedure, supra, § 268 et seq.) No label is required.

Whether the facts alleged tender a 1983 claim is measured by federal law. (Bach v. County of Butte (1983), 147 Cal.App.3d 554, 560-563.) "[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." (Parratt v. Taylor (1981), 451 U.S. 527, 535 [68 L.Ed.2d 420, 428].) The denial of AFDC benefits by state officials in violation of federal statutes presents a classic 1983 claim. (E.g. Shea v. Vialpando (1974), 416 U.S. 251 [40 L.Ed.2d 120]; Maine v. Thiboutot (1980), 448 U.S. 1, 2-8 [65 L.Ed.2d 555, 558-562].)

The defendants rely upon Logan v. Southern Cal. Rapid Transit Dist. (1982), 136 Cal.App.3d 116. *Logan* held that a complaint, which alleged a violation of proced-

ural due process as a legal conclusion, failed to state a claim under section 1983. Conclusory assertions are insufficient to state a section 1983 claim. (See Agnew v. City of Compton (9th Cir. 1957) 239 F.2d 226, 231-232.) That did not happen here. The complaint identifies the federal statute and details the facts showing a deprivation of a right secured by federal law. The plaintiffs prevailed on this ground. (See Green v. Obledo, supra.)

Having prevailed on the 1983 claim, attorneys' fees may be awarded plaintiffs under section 1988. "It follows from [the legislative history of section 1988] and from the Supremacy Clause that the [attorneys] fee provision is part of the § 1983 remedy whether the action is brought in federal or state court." (Maine v. Thiboutot, supra, 448 U.S. at p. 11 [65 L.Ed.2d at p. 563]; cf. Serrano v. Unruh (1982), 32 Cal.3d 621, 638, fn. 26.) This court has so held. (See Filipino Accountants' Assn. v. State Bd. of Accountancy (1984), 155 Cal.App.3d 1023, 1032.)

But, say the defendants, section 1988 cannot support the enforcement of the attorney fees award since 1988 was not explicitly tendered as a ground of the award. This argument sounds in estoppel. It is not persuasive. It is true that a portion of the attorney fees award (for work in the trial court) was predicated upon state law entitlements without mention of section 1988. But that is a fact without significance. The criteria for the calculation of attorneys' fees are the same under both sections. (*Serrano,* supra, 32 Cal.3d at pp. 638-639, fns. 27-29.) The state was not disadvantaged in the measurement of fees by the subsequent reliance on section 1988 as a ground justifying enforcement of the award. The state points

to no issue concerning the section 1988 award not subsumed in the prior adjudication.[3]

II.

Failing these arguments, the defendants attack the jurisdiction of the court to invoke section 1988 because, so they say, that would engender a confrontation between federal law and State Budget Act restrictions resulting in a usurpation of the Legislature's power to appropriate funds. The plaintiffs respond that the federal Supremacy Clause preempts the restrictions.[4] We need not play host to a confrontation because the State Budget Acts, properly construed, impose no restrictions upon the payment of attorney fees predicated upon section 1988. (See generally e.g. Palermo v. Stockton Theatres, Inc. (1948) 32 Cal. 2d 53, 65-66.).

The plaintiffs seek enforcement of the fee awards by an order compelling the Director of the Department

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[3] Analogously, an appellant may change his theory on appeal, to support or attack judicial action, when a question of law alone is presented on the uncontested facts. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 288.) Moreover, we note that newly enacted attorney fee statutes may be applied to cases pending on appeal. (See Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 931-932.) Nothing is gained by compelling the prevailing plaintiff to "run up the bill" with duplicative briefing in fee proceedings. The party who must foot the bill for such superfluity is the defendant. (See Serrano v. Unruh, supra, 32 Cal.3d at pp. 638-639.)

[4] For reasons which appear in the text, we do not reach this issue. However, we note that the argument has been rejected by the Ninth Circuit Court of Appeals. "[A] state cannot frustrate the intent of section 1988 by setting up state law barriers to block enforcement of [such] an attorney's fees award." (Spain v. Mountanos (9th Cir. 1982) 690 F.2d 742, 746.)

of Social Services to submit a claim to the Controller for payment of the fees award. The defendants concede that, in the absence of a budget restriction, the satisfaction of a fee award entered against a state official, sued in his official capacity, may be obtained from funds appropriated to the operating expense account of the responsible state agency. (See Mandel v. Myers (1981), 29 Cal. 3d 531, 542-545; but see Sullivan v. Gage (1905), 145 Cal. 759, 765-769.)[5]

But, say the defendants, there is a restriction in the State Budget Acts. They imply it from a fusion of two provisions of the acts. The first provides that "[w]henever [ ] an appropriation is made in accordance with a schedule [ ], the expenditures from such item for each *category, program,* or *project* included in the schedule shall be limited to the amount specified [ ], except as otherwise provided. . . ." (Emphasis added.)[6] The second

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[5] Under California law "where a statute gives the right to fees, they are considered costs." (See 4 Witkin, Cal. Procedure (1983 supp. to vol. 4) Judgment § 124C, p. 279; id (2d ed. 1971) § 116; cf. T.E.D. Bearing Co. v. Walter E. Heller Co. (1974) 38 Cal.App.3d 59; Beneficial Standard Properties, Inc. v. Scharps (1977) 67 Cal.App.3d 227.) However, we note that this point was left undetermined in *Mandel, supra,* 29 Cal.3d at p. 545, fn. 7. The payment of costs is specifically provided for by statute. "Notwithstanding any other provisions of law, when the State is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the appropriation for the support of the agency on whose behalf the State appeared." (Code Civ. Proc., § 1028.)

[6] Section 3 of the Budget Act of 1983 (Stats. 1983, ch. 324, p. 398) reads in pertinent part as follows: "Whenever herein an appropriation is made in accordance with a schedule set

(Continued on following page)

limits attorney fee awards, "*but only* [those awards made] pursuant to the provisions of Code of Civil Procedure section 1021.5, the 'private attorney general' doctrine, or the 'substantial benefit' doctrine. . . ." (See item number 9810-001-001 in Stats. 1982, ch. 326, § 2; Stats. 1983, ch. 324, § 2; Stats. 1984, ch. 258, § 2 [hereafter collectively item 9810-001-001][7]; empasis added.) This latter provision, so the defendants assume, establishes the categories for attorney fee awards and the amounts to which the limitation applies. Defendants then analogize a 1983 action to one brought as a "private attorney general", thereby bringing this action within one of the specified categories. The argument is unpersuasive.

The argument assumes that item 9810-001-001 is the only budgetary source of money for attorney fees, thus justifying a broadened use of analogy. That is not the

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(Continued from previous page)

forth after such appropriation, the expenditures from such item for each *category, program,* or *project* included in the schedule shall be limited to the amount specified for such category, program, or project, except as otherwise provided in this act. Each such schedule is a restriction or limitation upon the expenditure of the respective appropriation made by this act, does not itself appropriate any money, and is not itself an item of appropriation." (Emphasis added.)

[7] Item 9810-001-001 of the Budget Act of 1982 provides, in relevant part: "For payment of attorney fee claims, settlements, compromises, and judgments against the state, its officers, and officers and employees of state agencies, departments, boards, bureaus or commissions, supported from the General Fun, *but only* pursuant to the provisions of Code of Civil Procedure Section 1021.5, the 'private attorney general' doctrine, or the 'substantial benefit' doctrine . . . ." (Emphasis added.) The provisions which accompany this appropriation, inter alia, restrict the availability to a maximum of $50,000 per action and to an hourly rate of recompense equal to that charged by the Attorney General. (Ibid.)

case; the listed grounds subsume but one statutory basis (among many) and two (judicially created) common law bases (among several) of recovery of attorneys' fees. The provision only addresses the specified kinds of cases; a 1988 case is not specified. If the term "'private attorney general' doctrine" were to subsume analogous statutory authorizations for the payment of fees, there would be no need to separately specify Code of Civil Procedure section 1021.5, as the item does, for it is such. (Woodland Hills, supra, 23 Cal.3d at p. 933.) The item does not embrace the statutory ground of section 1988.

We will not read in an expansion of the restricted categories of the item because to do so would impede the payment of the state's debts. The plaintiffs have a final judgment that the state is indebted to them in the amount of the attorney fees awarded. The Legislature has the *power* to prevent judicial enforcement of certain debts where moneys have not been appropriated for their payment. However, the exercise of that power must not be lightly implied. Any repudiation of a lawful debt is an injustice. (McCauley v. Brooks (1860), 16 Cal. 3, 51.) We will not impute such a purpose to legislation unless it is unambiguously expressed. It is not.

Moreover, to infer that a section 1988 award is within the restrictive scope of item 9810-001-001 would place the Legislature at loggerheads with the Congress. "Congress recognized that [federal Civil Rights Acts] suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history [of section 1988] makes it clear that in such suits attorney's fees awards should generally be obtained 'either directly from the official,

in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).' S Rep No. 94-1011, p. 5 (1976)." (Hutto v. Finney (1978), 437 U.S. 678, 700 [57 L.Ed.2d 522, 540]; also cf. Code Civ. Procedure, § 1028, fn. 5 *ante*.)

Item 9810-001-001 does not restrict the payment of attorney fee awards, arising under section 1988, out of the operating budget of the Department of Social Services.[8]

Disposition

The judgment of the trial court is reversed insofar as it declines to order submission of the attorneys' fee claim to the comptroller. The trial court is directed to modify the judgment to order the Director of the State Department of Social Services to submit the attorney

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[8] Budget Act provisions reinforce this conclusion by acknowledging the propriety of the payment of fees expressly authorized by any statute other than Code of Civil Procedure section 1021.5. Thus: "4.50. No funds appropriated by this act may be used to pay court-awarded attorney's fees *unless* payment of such fees is either: "(a) Specifically authorized and set forth in an item or section of this act; or (b) *Expressly authorized by a statutory provision other than Section 1021.5 of the Code of Civil Procedure.* [¶] Provided that this section shall not be construed as making an apprpriation of funds for the payment of court-awarded attorney's fees." (Stats.1982, ch. 326, § 4.5; Stats.1983, ch. 324, § 5.00; Stats.1984, ch. 258, § 5.00; emphasis added.) This says that, despite the absence of an express authorization for payment of attorney fees in an appropriation item, funds otherwise appropriated by the Budget Act may be used for the payment of fees, if the award is expressly authorized by a statutory provision other than Code of Civil Procedure section 1021.5. Section 1988 fits this bill.

fees judgment claim to the Controller for payment. (See Code Civ. Proc., § 708.710 et seq., esp. § 708.740.) Any further relief is premature. There is no reason to believe the Controller would refuse to authorize, or the Treasurer refuse to pay, a lawful claim upon the state's fisc. As modified, the judgment is affirmed.

BLEASE, J.

I concur:

EVANS, J.

I concur in the result:

REGAN, Acting P.J.

APPENDIX B

[162 Cal.App.3d 202g]

[Civ. No. 22869. Third Dist. Dec. 5, 1984.]

ELIZABETH GREEN et al., Plaintiffs and Appellants, v. MARIO OBLEDO, as Director, etc., et al., Defendants and Respondents.

[Modification of opinion (161 Cal.App.3d 678;—Cal.Rptr. —) on denial of petition for rehearing.]

THE COURT.*--It is ordered that the opinion filed herein on November 6, 1984, be modified in the following particulars:

1. On page 6, footnote 4, line 2 [161 Cal.App.3d 683, advance report, fn. 4, lines 2-3], insert the word "defendants" in front of argument so that the sentence reads: "However, we note that the defendants' argument has been".

2. On page 11, line 3 [161 Cal.App.3d 686, advance report, 1st full par., line 3], the word "comptroller" should be "Controller."

The petition for rehearing is denied.

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*Before Blease, J., and Evans, J.

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FILED
JUL 3 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1780

In The

Supreme Court of the United States

October Term, 1984

LINDA McMAHON, California Director
Of Social Services,

Petitioner,

vs.

ELIZABETH GREEN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

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QUESTION PRESENTED

May a state court award attorneys' fees under the Civil Rights Attorneys' Fees Award Act of 1976 (codified at 42 USC § 1988) in a class action in which equitable relief is sought and obtained against state officials, enjoining them from enforcing state regulations that conflict with the Aid to Families with Dependent Children (AFDC) provisions of the federal Social Security Act (codified at 42 USC § 602(a)(7))?

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STATUTES INVOLVED

California Code of Civil Procedure § 1021.5 provides:

> 1021.5. *Attorney fees; enforcement of important rights affecting public interest*
>
> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

18A West's Annotated California Codes

California Code of Civil Procedure § 1028 provides:

> § 1028. *Award against state; payment from agency appropriation*
>
> Notwithstanding any other provisions of law, when the State is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the appropriation for support of the agency on whose behalf the State appeared.

18A West's Annotated California Codes

California Code of Civil Procedure § 1095 provides:

> § 1095. *Judgment for applicant; damages, peremptory writ; officer of public entity as respondent*
>
> If judgment be given for the applicant, the applicant may recover the damages which the applicant has sus-

tained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and a peremptory mandate must also be awarded without delay. Damages and costs may be enforced in the manner provided for money judgments generally. In all cases where the respondent is an officer of a public entity, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the public entity represented by the officer, and not against the officer so appearing in the proceeding, and are a proper claim against the public entity for which the officer appeared and shall be paid as other claims against the public entity are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in the proceeding in good faith. For the purpose of this section, "public entity" includes the state, a county, city, district or other public agency or public corporation. For the purpose of this section, "officer" includes officer, agent or employee.

18A West's Annotated California Codes,
1985 Cumulative Pocket Part

STATEMENT OF THE CASE

This has been a 42 USC § 1983 action from the very beginning: respondents (hereinafter "recipients") commenced this class action in 1975, alleging that petitioner, (hereinafter "Director"), a state official, was enforcing state regulations which conflicted with the Aid to Families with Dependent Children (AFDC) provisions of the federal Social Security Act (codified at 42 USC § 602(a)(7)). Both the trial court and the California Supreme Court held the regulations invalid on the ground that they conflicted with § 602(a)(7). See *Green v. Obledo* (1981)

29 Cal.3d 126, 624 P.2d 256. Recipients thus prevailed on their § 1983 claim in both courts. Recipients were then awarded equitable relief against continued enforcement of the regulations and retroactive relief affording class members the opportunity to recover the benefits withheld from them in violation of § 602(a)(7). *Ibid.*

Following the decision of the California Supreme Court granting recipients relief on their § 1983 claim, recipients commenced proceedings to recover attorneys' fees from the Director. As a result, $34,439.50 in fees became due and payable May 8, 1981 and an additional $56,246.25 in fees became due and payable May 27, 1982.

These fees were awarded under California Code of Civil Procedure § 1021.5 (hereinafter "CCP § 1021.5") the codification of the state private attorney general theory. Provisions in the state budget act prevented collection of these awards under CCP § 1021.5.[1] However, these pro-

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1. These provisions limited the amounts of such awards and the hourly rates from which they are computed so that only a fraction of the award in this case could be collected. The validity of such provisions under state law is a question now pending before the same California court of appeal which decided this case. The pending case is *Cooper, et al. v. Obledo, et al.* (Sacramento Superior Court No. 219 145) 3 Civ. —— (notice of appeal filed May 7, 1985). Each state budget act prescribes appropriations for a single fiscal year only. A new state budget act must be enacted each year (see California Constitution, Article IV, § 12(c), 1A West's Annotated California Codes). An additional question before the court of appeal in *Cooper, ante,* is whether, under the state constitution, restrictions in subsequent budget acts can limit payment of a judgment which became final before enactment of that legislation.

visions were not intended to, and do not, apply to awards under the Civil Rights Attorneys' Fees Award Act of 1976 (codified at 42 USC § 1988); furthermore, other budget act provisions expressly authorize payment of such statutory awards (Petition, App. A, p. 10a n.8). Therefore, to avoid these impediments to collection under CCP § 1021.5, the recipients moved the trial court for an order compelling payment of the fees[2] under § 1988, which is closely analogous to CCP § 1021.5.[3] The recipients pointed out that they were entitled to an award under § 1988 because they had prevailed on their § 1983 claim. Recipients also demonstrated that there was no difference between § 1988 and CCP § 1021.5 in computing the amount of the award and that the § 1988 entitlement raised no issues not already decided by the court in making the CCP § 1021.5 award. The trial court denied the motion without stating reasons and the recipients appealed.

The California Court of Appeal agreed with recipients and required that the Director take action to cause

---

2. The Director implies that the recipients have sought an order compelling the state to appropriate money to pay these fees and asserts that the state is unable to pay the fees. Petition, p. 7. Throughout the litigation, the Director has been relentlessly inaccurate on this. The recipients have never sought to compel an appropriation; they have simply sought an order compelling payment from existing appropriations (see Petition, App. A, pp. 2a, 10a-11a) which, under state law, are available for such payment (*Mandel v. Myers* (1981) 29 Cal.3d 531, 543-544, 629 P.2d 935, 941-943; *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 197-198, 182 Cal.Rptr. 387, 393).

3. See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 632-634, 632 n.13, 632-633 n.14, 652 P.2d 985, 991-993, 991 n.13, 992 n.14.

the fees to be paid.[4] The Director then filed a petition for rehearing and that was denied. The Director next filed a petition for hearing in the California Supreme Court and that was denied. The Director now petitions this Court for relief from paying these awards.

—o—

ARGUMENT

The California Court of Appeal decided that (1) recipients had pleaded facts sufficient to state a cause of action under 42 USC § 1983; (2) fees were therefore awardable under 42 USC § 1988; and (3) there were no state law restrictions on the payment of such an award.[5]

The decision of the Court of Appeal is correct. It does not conflict with the decision of any other state court of last resort, of any federal court of appeals, or of this Court. Moreover, the question presented by this case has been recently settled by this Court in *Maine v. Thiboutot* (1980) 448 U.S. 1, a landmark decision grounded upon twelve years of decisions by this Court involving § 1983 claims based on violations of the federal Social Security

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4. The Director asserts, without any support, that "[a]s a result [of the Court of Appeal decision] many heretofore uncollectibly large judgments are now eligible for conversion to, and enforcement as, judgments in civil rights actions." (Petition, p.9). There is no more support for this remark in the record than there is in the Petition.

5. The Court of Appeal did not reach the Supremacy Clause issues described by the Director (Petition, pp. 8-9) because it did not need to do so. Petition, App. A, p. 6a, n.4.

Act (*Id.* at 4, 5-6). The petition for writ of certiorari should be denied.

I. THE QUESTION PRESENTED BY THIS CASE HAS BEEN DECIDED IN RESPONDENTS' FAVOR BY THIS COURT IN MAINE v. THIBOUTOT.

The absence of any mention of *Maine v. Thiboutot* from the Petition is conspicuous and the implication is clear: it cannot be distinguished from this case. In *Thiboutot* a class action was commenced alleging that state officials were enforcing state regulations which conflicted with the AFDC provisions of 42 USC § 602(a) (7). 448 U.S. at 2-3. As a result Maine disallowed the deduction of certain expenses and reduced AFDC grants accordingly. *Id.* at 3; see *Thiboutot v. State* (Me. 1979) 405 A.2d 230, 232. The court held the regulations invalid on the ground that they conflicted with § 602(a) (7) and the plaintiffs were awarded equitable relief against continued enforcement of the regulations and retroactive relief affording class members the opportunity to recover the benefits withheld from them in violation of § 602(a) (7). *Id.* at 2-3. The trial court denied attorneys' fees to plaintiffs under 42 USC § 1988 but the Supreme Judicial Court of Maine reversed, holding that fees could be awarded under 42 USC § 1988. 405 A.2d at 239-240. This Court affirmed that decision. 448 U.S. at 4.

This case is indistinguishable from *Thiboutot*. Recipients commenced a class action alleging that state officials were enforcing state regulations which conflicted with 42 USC § 602(a) (7). *Green, ante,* 29 Cal.3d at 132,

624 P.2d at 258-259. As a result California disallowed the deduction of certain expenses and reduced AFDC grants accordingly. 29 Cal.3d at 132-133, 624 P.2d at 259. Both the trial court and the California Supreme Court held the regulations invalid on the ground that they conflicted with § 602(a) (7) and recipients were awarded equitable relief against continued enforcement of the regulations and retroactive relief affording class members the opportunity to recover the benefits withheld from them in violation of § 602(a) (7). *Green, ante,* 29 Cal.3d 126, 624 P.2d at 256. The trial court denied recipients' motion to compel payment of its attorneys' fees awards under 42 USC § 1988, but the California Court of Appeal held that those fees were awardable under 42 USC § 1988. Petition, App. A.

The Director claims that the availability of a "comprehensive federal-state statutory remedy" bars an award of fees under 42 USC § 1988. Petition, pp. 11-12. This obviously ignores the existence of *Thiboutot* in which the same federal-state statutory 'scheme' did not preclude the award of fees under § 1988. In addition, the Director ignores the holding of the California Supreme Court in *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 690-691, 484 P.2d 93, 96-97: the federal-state AFDC system provides no remedy corresponding to the class relief sought in this case and there is therefore no requirement that remedies provided by that system be exhausted prior to seeking such class relief.

The *Thiboutot* decision requires that the petition for certiorari be denied. See also *Shea v. Vialpando* (1974) 416 U.S. 251, 257-258.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DOES NOT CONFLICT WITH SPENCER v. SOUTH CAROLINA TAX COM'N.

Spencer is a very different case from this one. In *Spencer* North Carolina residents filed an action for an income tax refund, claiming that South Carolina law violated the Privileges and Immunities Clause. (S.C. 1984) 316 S.E.2d 386, 387. The trial court granted the refund but denied attorneys' fees and the South Carolina Supreme Court affirmed. *Ibid.* State law provided that in such refund actions there were to be no awards of costs or disbursements to either party and the state supreme court held that state remedies could not be "circumvented" by alleging a 42 USC § 1983 violation. *Id.* at 388-389. The South Carolina Supreme Court, noting that the trial court had ignored the § 1983 claim, also emphasized that this Court had not required state courts to exercise jurisdiction over such claims. *Ibid.*

The questions presented to this Court in the petition for certiorari in *Spencer* were:

> (1) May state court of general jurisdiction refuse to entertain 42 USC 1983 claim and thereby avoid awarding attorneys' fees under § 1988, even though taxpayer successfully challenges constitutionality of state statute in that court? (2) May state court deny attorneys' fees under §§ 1983 and 1988 on ground that Congress did not intend to require award of attorneys' fees where state law provides remedy and prohibits award?
>
> 53 U.S.L.W. 3281 (U.S. No. 84-249)

Neither of these questions is presented by this case. Whether a state court may refuse to exercise jurisdiction over a § 1983 claim is not presented because the California

courts in this case did not refuse to exercise jurisdiction over recipients' § 1983 claim. This Court has previously noted that a case from the California courts does not present this question because those courts have chosen to exercise jurisdiction over § 1983 claims. See *Martinez v. California* (1980) 444 U.S. 277, 283-284 n.7. The question of awarding fees under § 1988 in a case where state law provides a remedy and prohibits such an award does not arise because in this case the state legislature has chosen not to prohibit or restrict the payment of § 1988 fee awards (Petition, App. A, p. 9a) and, in fact, has expressly authorized the payment of such statutory awards (*Id.*, p. 10a n.8). Moreover, in contrast to South Carolina's prohibition of awards of costs and disbursements in tax refund actions, California expressly requires payment of costs (which include statutory fee awards) by state agencies in actions like this one. See California Code of Civil Procedure §§ 1028, 1095 (an action for injunctive relief against state officials in their official capacity is an action in which the state is a party within the meaning of § 1028. *Boland v. Cecil* (1944) 65 Cal.App.2d Supp. 832, 150 P.2d 819); and see n.8, *post* p. 16.

Thiboutot, ante, 448 U.S. 1, is dispositive of the petition for writ of certiorari. *Spencer* has no bearing on it.

III. THE TIMELINESS OF AFFIXING A "42 USC § 1983 LABEL" TO A § 1983 CAUSE OF ACTION IN STATE COURT PRESENTS NO FEDERAL QUESTION.

The Director complains that recipients' failure to label their cause of action a 42 USC § 1983 claim until after trial presents important questions of federal law. Petition,

pp. 13-15. Actually, this matter presents no federal question at all—it is a matter controlled by state law. It is well settled in both federal and state jurisdictions that, in state court actions based upon federal statutes, the law of the state is controlling in all matters of practice and procedure (absent contrary provisions in the federal statute, and there are none in this case). See *Ches. & Ohio Ry. v. De Atley* (1916) 241 U.S. 310, 316-317; *King v. Schumacher* (1939) 32 Cal.App.2d 172, 181, 89 P.2d 466, 472 *cert. den.* 308 U.S. 593 (1939). Accordingly, the decision by the court of appeal on this 'labelling' issue presents no federal question.[6]

Moreover, under California law there is no difference between § 1988 and CCP § 1021.5 (under which fees were awarded in this case in 1981 and 1982) in computing the amount of the fee award, and the § 1988 entitlement raised no issues not already decided in adjudicating the CCP § 1021.5 entitlement. See Petition, App. A, pp. 5a-6a. Accordingly, absolutely no prejudice to the Director has resulted from the failure to affix the "42 USC § 1983 label" earlier. *Ibid.*

The Director offers a lengthy discussion of "immunities." Petition, pp. 13-15. This discussion has nothing whatsoever to do with this case. This is not and never

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6. The court of appeal held that recipients' failure to affix the "42 USC § 1983 label" until after trial was immaterial. California law is clear on this point. *See People v. Common Counsel* (1890) 85 Cal. 369, 371, 24 P. 727, 728; *Shields v. Oxnard Harbor District* (1941) 46 Cal.App.2d 477, 486, 116 P.2d 121, 127-128; and see generally 3 Witkin, *California Procedure* (2d ed. 1971), Pleading, § 22; James, *Civil Procedure* (1965) § 3.7 at p. 107.

has been an action for damages.[7] This has always been an action against state officials for equitable relief, relief sought and obtained against them in their official capacities, not in their individual capacities. Recipients have never claimed or offered any evidence that the Director is liable for anything in her individual capacity and nothing in this case suggests any possibility for such liability. The attorneys' fees awarded in this case are against the Director in her official capacity (see Petition, App. A, pp. 10a-11a) and it is firmly established that such awards are payable from funds of the responsible state agency or from other state funds. See, e.g., *Hutto v. Finney* (1978) 437 U.S. 678, 693, 700; see also Petition, App. A, pp. 7a, 9a-10a.[8]

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7. Even if it were, "[t]he legislative history of [42 USC § 1988] confirms Congress' intent that an attorney's fee award be available even when damages would be barred or limited by 'immunity doctrines and special defenses, available only to public officials'." *Pulliam v. Allen* (1984) — U.S. —, 80 L.Ed.2d 565, 580; and see *Supreme Court of Virginia v. Consumers Union of the United States* (1980) 446 U.S. 719, 738-739.

8. Moreover, California law requires that these fees be recovered from the state agency, not from the Director (this action was brought pursuant to California Code of Civil Procedure § 1085, and §§ 1028 and 1095 of that Code impose this requirement inasmuch as fees awarded pursuant to statute are costs in California. See, e.g., *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.3d 59, 62, 112 Cal.Rptr. 910, 912; see also Petition, App. A, p. 7a n.5.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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